JOHORE.

[ORIGINAL CIVIL JURISDICTION]

BAILEY, J.

December 21, 1933.

[APPELLATE JURISDICTION]

HUGGARD, C.J., THORNE & GERAHTY, JJ.

April 19, 1934.

THE STATE OF JOHORE ..... Defendants (Appellants)

vs.

TAN AH BOON ..... Plaintiff (Respondent)

[JOHORE CIVIL SUIT No. 26 of 1933]

[JOHORE CIVIL APPEAL No. 1 of 1934]

Land—Occupation under approved application—Default in payment of rent—Recovery by sale of moveable property whether illegal—Title—Application of equitable principles—Johore Land Enactment, Part VII; Land Rules, Rule 8.

Under the system in force in the State of Johore alienation of land is not complete until the issue and registration of a grant made in pursuance of the Land Enactment. Although upon the approval of an application an area of land may cease to be "State land" within section 2 of the Enactment, the State does not divest itself of its ownership until and unless a grant has actually been issued and registered.

Whatever equitable rights an occupier of land held under an approved application may have, such rights would rest in contract and would entitle him to enforce specific performance. In such cases any claim founded on tort, is not maintainable.

Part VII of the Land Enactment regulating the recovery of arrears of rent would not apply to land which is merely the subject of an approved application.

Action tried before Bailey, J. on 25th, 26th November, 11th 17th, 19th, 20th and 21st December 1933.

The material facts appear sufficiently and are set out in the Judgment of Bailey, J. below.

Goho (*Bannerjea* with him) for the plaintiff.

M. C. Hay, Legal Adviser, for the Defendants.

Cur. Ad. Vult.

BAILEY, J.—In this case the undisputed facts are as follows.

The Plaintiff applied to Government in the years 1917 and 1918 for Grants for 20 and 80 acres of land respectively at Jeram Batu, Pontian Kechil, Johore, the application being made on the appropriate Forms of Application under and by virtue of the Land Enactment 1910. Exhibits B1 and B2.

To these applications the Plaintiff received a reply from Government through the Collector of Land Revenue to the effect that in reply to Plaintiff's application for a Grant of 100 acres of State Land at Jeram Batu, the alienation to him of 110 acres of land in that locality had been approved on the terms and conditions set out in the Land Enactment and the Rules made thereunder.

This reply was communicated by a letter from the Collector to the Plaintiff dated the 25th July, 1922 in which it was also stated that if the Plaintiff accepted the terms offered he would be required to pay to Government the following sums:—

Rent for 1922	$330.00
Survey fee on and stone on 110 acres	$295.00
Premium	$550.00
Total ..	$1,175.00

This letter was put in and is marked Exhibit B3.

The Plaintiff paid to Government the above Sums for premium rent and Survey fees, and this is admitted by Defendants, and by so doing accepted the terms set out in Exhibit "B".

It is not quite clear from the evidence whether the Plaintiff had actually gone into possession prior to his applications A1 and A2 in 1917 and 1918 though the wording of those documents would appear to show that it was so.

However that may be, the Plaintiff had certainly gone into possession some years before the receipt of Exhibit "A3" and the payment by him of the rent and fees thereunder, and he had by that time felled and cleared the land and planted it with cocoanut and areca nut trees.

The rent payable was at the rate of $330.00 per annum and this the Plaintiff continued to pay up to and including the 31st December, 1928.

Plaintiff however failed to pay rent for the years 1929 and 1930.

It is the action of Government in relation to the recovery of this rent which has given rise to this Suit.

The action taken by Government is shortly set out in the Minutes in Papers C.L.M. 407/17 a copy of which is contained in the Bundle of copy Correspondence and other documents which were put in by consent and marked Exhibit "A" and will be found on pages 6, 7, 8, 9, and 10 of that Exhibit, and in this connection Exhibit "E1" is important.

On the 30th July, 1930 a Warrant of Attachment in the form in Schedule V under section 80 of the Land Enactment 1910 was issued by the Collector of Land Revenue and directed to Penghulu Sabtu bin Haji Bedin and Settlement Officer Abdullah bin Rejab. This is Exhibit "B4".

The Warrant was executed by the Settlement Officer Abdullah and the Penghulu Sabtu on the 3rd August, 1930 and the attachment was effected by posting a Notice of Attachment in the Form in Schedule "W" under section 81 of the Land Enactment 1910 on each of the two pig styes belonging to the Plaintiff one of which contained 20 pigs and the other 5 pigs. The Notices were respectively Exhibits "B5" "J1."

The property attached was put up for sale by Public Auction on the spot on the 27th September, 1930 but nobody attended the Sale, which proved abortive and the property was never put up for sale again thereafter.

The Minutes on page 6 of Exhibit "A" show the lines on which Government then proceeded, as at the bottom of that page there is a "Note" which reads "This is to be treated as title as fees have been paid. This land will have to be sold, if the amount cannot be recovered, under Part VII by sale of attached property." Enquiries were then made as to whether the Plaintiff had other property in another district but it was found that he had not.

The Plaintiff's land was eventually sold by Public Auction on the 24th October, 1931 and was bought by one Lee Wee Nam of Singapore for $925.00 after an abortive sale held on the 18th July, 1931.

Both the documents produced and the Minutes in Exhibit "A" show clearly that Government, through the Collector, purported to act under Part VII of the Land Enactment 1910.

I will now turn to the oral evidence in this Suit.

The Plaintiff after giving evidence as to his application for 20 acres and 80 acres and of the receipt by him from Government of the letter of the 25th July, 1922, Exhibit "B3" stated that he had been in occupation of the land for some seven or eight years prior to the receipt of Exhibit "B3" under felling permit and had cleared the land and planted it with cocoanut and areca nut palms.

He had erected a house for himself which was used partly as a dwelling house for himself and his family of 10 children and partly as a provision shop and liquor shop and also partly as quarters for some twenty coolies.

After planting up, Plaintiff erected on the land nine small dwelling huts (chukias) in which altogether 50 or 60 people, including children lived and also drying sheds for copra and for areca nuts.

Both he and the people on the land reared pigs, fowls and ducks and some were boatmen who had between them six small sampans and one large sampan, the latter being used for conveying tapioca. Plaintiff was the sole proprietor of the land and of the provision shop and liquor shop and he stated that his land was used as a sort of port and in this connection it should be mentioned that one of the witnesses for the Defence, Abdullah bin Rejab, the Settlement Officer admitted that the Plaintiff was a big enough man in the district to be called "Towkay".

The Plaintiff stated that on the day of the attachment, 3rd August, 1930 he had his house and the provision shop and liquor shop, though his license for the latter expired at the end of that year and was not renewed.

He stated that his house was a larger one and was two storied, built with timber posts, plank walls and an attap roof and had a raised plank floor and that he had spent $3,000.00 on it and that in 1930 would, if sold, have fetched at the lowest $1,000.00.

Plaintiff valued the stock of liquor and furniture in that shop on the 3rd August, 1930 at $200.00 and the value of the goods in the Sundry goods and provision shop at $500.00 and the furniture in that shop at $200.00.

Plaintiff supplied all the people in the Kampong and there was no other shop in that Kampong.

He further stated that on that date he had 18 pigs large and small which he valued at $200.00.

He further valued the clothing boxes and other things in his house at about $300.00 and he had also a gun which he valued at $100.00.

On the date of the attachment and at all material times onwards the plantation was fully planted with cocoanut and areca nut palms which were in full bearing and on that date there were about 27 or 28 pikuls of copra and from 4,000 to 5,000 plucked cocoanuts either in the drying shed or near his house.

He also stated that there were between 5,000 and 6,000 cocoanuts on the trees ripe for plucking and that when plucked he would value them at $150.00 to $180.00.

He further stated that there were 5,000 cocoanut trees bearing on the average 50 young unripe nuts and that he would value the unplucked areca nuts when plucked at $200.00, and also implements of agriculture and husbandry valued at $100.00.

Plaintiff further stated that he was offered by one Chia Ah Meng, a Singapore broker $40,000 about 10 years ago, and that he valued the property in 1930 in spite of diminishing values at about the same price as the trees were not all in full bearing 10 years previously and he would estimate the price of an Estate such as his fully planted with cocoanuts in full bearing in 1931 at about $200.00 an acre. Plaintiff also carried on business with Chop Huat Seng Hua Kee of Singapore in selling copra and areca nuts for over 20 years. This business, as appears from the account Exhibit "H" and its translation "H1" was a sound one, at any rate in August and September, 1930 and had apparently been so for many years according to the evidence of Sim Kow Chiang the Manager of Chop Huat Seng Hua Kee and business continued up to April or May, 1933.

Plaintiff called an Auctioneer named Mohamed bin Haji Jamaludin who on the 5th October, 1933 in pursuance of Execution proceedings against the Plaintiff in Civil Suit No. 4 of 1933, sold pigs, ducks fowls and also furniture in the Plaintiff's house for $89.60, thus proving that there was in fact other moveable property of his on the land on the 3rd August, 1930.

The only other witness for the Plaintiff was Sim Kow Chiang, the Manager of the Singapore Chop Huat Seng Hua Kee, who corroborated the evidence of the Plaintiff as to the business of buying and selling copra and betel nuts carried on between them.

Only two witnesses were called for the Defendants namely, Abdullah bin Rejab, Settlement Officer and Sabtu bin Haji Bedin, Penghulu of Mukim Jeram Batu.

The first of these, the Settlement Officer, stated that on receipt of the Warrant of Attachment Exhibit "B4" he went to Plaintiff's land accompanied by the Penghulu and that they there found on the land 25 pigs in two styes, one containing 20 pigs and the other 5 pigs and that a Notice of attachment in the forms prescribed by section 81 of the Land Enactment was posted on each stye.

The translation of each of these Notices of Attachment were put in and marked as Exhibits "J1" & "J2".

The witness said that he looked about for other things to attach but did not find anything else.

He stated that there were no ripe cocoanuts on the trees at the time, that he saw no copra, that he looked into the Plaintiff's shop and saw some shelves and some old tin cases for keeping biscuits in and that he also looked into Plaintiff's house and found nothing, except some old plank sleeping places.

As regards the plantation, this witness stated that he went round the Estate and saw the trees but he did not see any ripe fruits on the trees but that about half the trees on the estate bore young cocoanuts about 6 or 7 inches in diameter and about half were bare or in flower.

As to the areca nuts the witness stated in cross-examination, first, that none of the areca nut trees were in bearing, then that one was in bearing then that there was more than one and finally that there were about 20% in bearing.

The gist of the rest of this witness' evidence as to the attachment is to the effect that he did find some moveable property either in the shop or house but did not think it worth attaching and that beyond the 25 pigs and styes nothing was attached. He did not attach the unripe cocoanuts because he did not think that they were liable to attachment.

This witness further stated that Notices of the Sale were distributed amongst the Kampongs near. The notices about 10 in number were written by the witness and were posted in shops, but no other steps were taken. He stated that he put no notice in the file or kept any copy; the date of the sale was fixed for the 27th September, 1930 and the time fixed was 12.0 noon.

No one came to bid at the Sale which proved abortive.

The Penghulu Sabtu corroborated the Settlement Officer as to the attachment, but he stated that having heard from the Settlement Officer as to the Sale he went on the day of the Sale and told the Chinese traders at Jeram Choh that there were pigs to be sold at Jeram Batu that day, that he got to Jeram Choh at about 11 a.m. and saw about 15 or 16 Chinese there and that it took him about an hour to do so.

Jeram Batu is about 3 miles from Jeram Choh and it takes about an hour to get from the one to the other.

This witness further stated that he did not see any notices posted anywhere and he received no copies to distribute. The Settlement Officer had told him that the Sale would be after 1 p.m.

The conclusions which I draw from the oral evidence are that the Plaintiff was in occupation of an estate of 110 acres fully planted with cocoanut trees in bearing with a smaller area of 25 acres planted with areca nut palms also in bearing, with the produce of which he carried on quite a good business with the Singapore Chop Huat Seng Hua Kee.

The Plaintiff stated in his evidence that he had goods in his shops to the value of $700 and furniture to the value of $200.00 and that the house could have been sold on the day of attachment for at least $1,000.00 and that he also had 18 pigs which he valued at $200.00. He also stated that there were 27 or 28 pikuls of copra and 4 000 or 5,000 plucked cocoanuts either in the dying shed or near his house, and about 5,000 ripe cocoanuts on the trees ready for plucking which he would value at $150.00 to $180.00.

He further valued his Estate as on the 3rd August, 1930 at $200.00 an acre.

I think that the Plaintiff was inclined to exaggerate the values which he put on his stock and furniture, but apart from that his testimony did not appear to be untrustworthy.

If his evidence is to be believed it proves conclusively that there was on the land in stock furniture copra cocoanuts and areca nuts, apart from nuts on the trees, other attachable moveable property which was probably far in excess of the sum of $660.00 which was the amount of the rent due in respect of which the attachment by the defendants was effected.

As against this there was the evidence of the Settlement Officer and of the Penghulu which I must characterize as unsatisfactory.

The impression conveyed to my mind as the result of their evidence was that they did not really know what they could legally attach or not and that the attachment was performed in the most perfunctory manner, and that if they had proper knowledge of their duties they could probably have found and attached sufficient moveable property to have more than covered the rent due on sale.

I therefore accept the plaintiff's evidence, apart from some exaggeration to which I have already referred, and I am not prepared to accept the statements of the Settlement Officer and the Penghulu as to their searches for other moveable property to be attached because in my opinion they did not know what to look for.

I therefore find as a fact that there was at the date of the attachment more moveable property on the land at that date than had been attached and it would probably have realised more than the $660.00 due for rent.

It is necessary now to examine the legal position of the parties to see what bearing the above finding on the facts has in relation to this Suit.

The Plaintiff founds his case upon breach of the Contract constituted by the letter Exhibit "A3" and the acceptance of its terms by the Plaintiff's payment of the rent for the current year, 1922, the Survey and stone fees and the premium.

The learned Legal Adviser admitted that there was no dispute that there was a Contract and if I understood him rightly, that both parties must stand or fall by that contract.

It is therefore necessary to construe the terms of the Contract which are contained in the letter Exhibit "A3" which reads as follows:—

Land Office,
Johore Bahru, 25th July, 1922.

"Sir,

In reply to your letter of the 12th February, 1917 in which you apply for a Grant for 100 acres at Jeram Batu, I have the honour to inform you that the alienation to you of 110 acres of State Land in that locality has been approved on the terms and conditions set out in 'The Land Enactment 1910' and Rules thereunder and subject to a premium of $5 per acre and an annual rent of $3.00 per acre from 1st January, 1922.

"2. Should you desire to avail yourself of the above terms, the undermentioned fees should be deposited in this Office within one month from this date.

Rent for 1922	$330.00.
Survey fee on and stone on 110 acres	$295.00.
Premium	$550.00.
Total ..	$1,175.00.

3. Unless special written permission has been sought and obtained no occupation of the land referred to will be allowed prior to the issue of the Grant."

It is not disputed that the fees were duly paid nor was there any suggestion that the occupation of the land by the Plaintiff after the acceptance of the terms was other than lawful.

Plaintiff contends that this formed a Contract whereby in consideration of the payment of a premium, survey fees and rent for the current year, the defendants agreed to the alienation of the land to the Plaintiff such alienation to be completed by the issue to him of a Grant for 110 acres, subject to the payment of an annual rent of $330.00 as from the 1st January, 1922 and that pending the issue of the Grant the land would be subject to the terms and conditions set out in the Land Enactment and the Rules thereunder so far as they might be applicable.

The Defendants claim that the Land Enactment and Rules in so far as they provide machinery for collection of land revenue have no application to lands not under title and that the words in Exhibit "A3" "On the terms and condition set out in the Land Enactment 1910 and Rules thereunder" only refer to the time when a Grant is issued.

The machinery for the collection of rent or revenue in respect of land is set out in Part VII of the Land Enactment 1910.

Section 78 of the Land Enactment provides that "Every sum now due or which shall hereafter become due to the Ruler of the State on account of rent or of any revenue due in respect of land may be recovered in the manner hereinafter provided."

Section 79 provides for service of a written notice of demand for payment of rent noncompliance with which within 15 days constitutes the person liable as a "defaulter" in respect of the sum due then known as an "arrear".

Section 80 provides as follows:—

"With a view to recovery of an arrear the Collector may issue an attachment substantially in the form of Schedule V and may seize by virtue thereof, any personal property of the defaulter wherever the same may be found and may also seize any effects or any crops, to whomsoever belonging, which may be found on the land in respect of which the arrear is due and may not less than three days after such seizure sell the same by public auction provided that, in the case of growing crops, it shall be lawful for the purchaser to retain possession thereof on the ground until ripe, and thereafter to reap or remove the same."

Section 80 provides for the attachment being made by a subordinate officer.

Section 82 reads as follows:—

"If the procedure prescribed by the two preceding sections proves ineffective for recovery in full of the arrear and costs, the Collector may proceed against the land in respect of which the arrear is due or next hereinafter provided."

Section 83 provides for the issue by the Collector of a notice of Sale and for the Sale by public auction at the expiration of four months of the whole or part of such land or interest therein.

Section 84 provides for the application of the proceeds of sale and sections 85, 86 and 87 deal with the matter of the title to the land and for its delivery to the Collector when called upon.

Now it should be noted that section 78 deals with the recovery of "Every sum due . . . . . on account of rent or of any revenue due in respect of land".

These words are very wide and in my view embrace all rent of any kind whether payable under Grant or otherwise and would cover rent payable under and by virtue of Exhibit "A3" and might even extend *pro tanto* to rent or revenue payable in respect of such things as the quarrying of stones where the defaulter is in occupation under a temporary occupation license.

It is also to be observed that this section refers to rent recoverable in respect of "any land" and does not confine such land to land held under Grant or any other form of title. There is no definition of "land" in the Enactment.

Rule 8 of the Land Rules 1929 provides that all land shall be liable to pay rent as land alienated, and Rule 5 provides that an applicant on payment of survey fees or demarcation fees with rent for the current year shall be authorised to occupy land.

As regards letter Exhibit "A3" my view is that the land, the subject matter of it, is to be held subject to the Land Enactment and the Rules made thereunder so far as the same may be applicable and that when the Grant is issued it will be held subject to the grant which will be in the form of Schedule 'C' of the Enactment and which provides that the land will be held *inter alia*, subject to the provisions contained in the Land Enactment and also to the special Conditions written on the Grant.

It being my opinion that the Contract provides that the land the subject matter of the Suit is subject to such of the Land Enactment and the Rules thereunder as are properly applicable to the case, it is necessary to decide whether the provisions of the Enactment and the Rules thereunder relating to the means of collection of rent and other revenue are applicable to this land.

Reading the various sections of the Enactment and the Rules thereunder to which I have referred above together, there is no doubt in my mind that the legislature intended that the special procedure laid down should be applicable to any lands and I so decide.

In view of this decision it is now necessary to ascertain whether on the facts before me the Collector has properly complied with the provisions of the Enactment so as to entitle him to proceed to sell the land occupied by the Plaintiff.

Numerous cases were cited by learned Counsel for the Plaintiff in support of his contention that those provisions had not been complied with, the most important of which is the case of "*Tham Hing Kwai* v. *State of Negri Sembilan and others*" which is reported in F.M.S. Law Reports 1932 January to June, Page 263.

The decision in that case was that of the Court of Appeal.

In the course of his judgment, Thorne, J. held in effect that there must be strict compliance with the provisions of the Enactment before the Collector can place himself in a position which enables him to offer the land of the Plaintiff for sale and that, unless the statutory provisions are complied with, the Collector is a trespasser, and his act of selling the land an unlawful act and an invasion of the rights of the land holder.

Thorne, J. further quoted from the Judgment of Woodward, C.J. in the case of the "*Collector of Land Revenue, Tapah* v. *Chong Loke Chong and another*" which is reported in 3 F.M.S. Law Reports Page 60, where he stated "My view is that unless each step prescribed by the Land Enactment is duly taken, the sale by the Collector against the will of the registered proprietor, must necessarily be void."

The cases cited all had reference to land held under title, but in view of my decision in this case, that is not a matter of importance and does not affect the principle.

I have dealt with the facts in some considerable detail and in my view the action of the Settlement Officer in attaching only some 25 pigs and two styes and proceeding thereafter to hold an abortive sale of them was not a strict and proper compliance with the provisions of section 80 of the Enactment.

An Enactment and its various provisions must be construed reasonably and it would in my opinion be unreasonable and indeed an absurdity to hold that the seizure and sale of, say, one chair found on the Plaintiff's land, when there was obviously other moveable property on the land which could be seized and sold, is such a reasonable compliance with the provisions of that section as would entitle the Collector to proceed to the sale of the land under sections 82 and 83 of the Enactment.

I hold, therefore, on the facts before me in this case that the Collector did not properly or strictly comply with the provisions of section 80 so as to entitle him to sell the Plaintiff's land or his interest therein.

If I am wrong in holding the provisions of the Land Enactment as to the special means of collecting rent are not applicable to the land in question, then the only remedy of the Defendants would appear to be to sue the Plaintiff for rent due as a common law debt in the ordinary way and as they have not pursued this course but one which has no relation whatever to the legal means of recovering a common law debt the Defendants have clearly committed an illegal act giving rise to a claim for damages.

The Defendants however, raise certain defences which it is necessary to consider.

The first of these is contained in paragraph 6 of the Defence in which it is contended that the effect of the application Exhibits "B1" and "B2" (of which Exhibits "A1" and "A2" are translations), and the letter Exhibit "A3" and the acceptance of its terms by the Plaintiff was no more than to create a demise from year to year of the land referred to therein, subject to an immediate forfeiture for non-payment of the rent reserved and that no better title was thereby intended to be or in fact was conferred upon the Plaintiff.

Counsel for Defendants made no attempt to cite any authority for this plea but merely reiterated his belief as to the effect of the documents referred to and I regret that I am quite unable to accept this defence.

By paragraphs 7 and 9 of the Defence the Defendants contend that it was a condition precedent to any liability on the part of the Defendants that the rent reserved by the letter Exhibit "A3" should be paid immediately upon becoming due and that by the reason of Plaintiff's default in payment of the rent the Plaintiff forfeited the land demised to him and/or relinquished all such other rights, if any, as he might have derived by reason of the facts, or any of them, alleged in the Defence, and by paragraph 10 of the Defence the Defendant contends, in amplification of paragraph 9, that at the time of the sale of the land, the Plaintiff had no lawful claims or title to the said land, immediate or in future or to the possession thereof through or under the Defendants, and that the Defendants were the sole and absolute owners thereof and free to dispose of the same without obligation to the Plaintiff in the manner alleged.

Here again no authority was cited for the proposition and I am unable to entertain this plea but the learned Legal Adviser was driven to suggest that, admitting a contract between the parties, the Defendants had rescinded it.

There is nothing in the Defence whereby the question of rescission is pleaded, or to show that Defendants elected to rescind.

Election to rescind must be evidenced by express words or writing or by conduct (*Benjamin Scarf* v. *Jardine*, L.R. 7 App. Cas. p. 345).

Assuming that there is a Contract there must be election to keep the contract alive or to rescind.

I am unable to find anything in the action of the Defendants which is consistent with rescission.

The Minutes contained in Exhibit "A3" and the letter from the highest administrative officer in the State Exhibit "E1" shows that the Defendants were acting all along on the supposition that the Land Enactment applied to the land in question and that action was inconsistent with rescission of a contract but was certainly more consistent with action under a live contract.

I regret that I am unable to share the view of the learned Legal Adviser on this plea.

The Defendants seek, as the learned Legal Adviser frankly stated, to take no account of the action in fact taken by the Defendants as having been mistaken *ab initio*, but to rely on Defences entirely apart from any action of theirs.

It appears to me that the Defendants by their conduct and that from perusal of the minutes in Exhibit "A" and of the letter from the General Adviser Exhibit "E1" they have admitted that the Land Enactment and the Rules thereunder, so far, at any rate, as they relate to the means of collection of rent, apply to the land in question and they cannot be heard now to say to the contrary.

The Defence raised by paragraph 10 of the Defence, namely, acquiescence and laches, is answered by the Judgment of Thorne, J. in the case of *Tham Hing Kwai* v. *State of Negri Sembilan and others* already referred to, where he states that such an argument is untenable as there is no duty cast upon members of the public to give Government Officers any advice as to the interpretation of the provisions of law with which they have to comply in the exercise of statutory rights and powers, and that members of the public are not the mentors of the Collectors of Land Revenue, who are supposed to know the law and comply with it, and if they do not comply with it the result of their non-compliance will be the usual consequence.

In one of the cases cited, namely, "*Tan Ho Cher* v. *Yeo Poh*, Johore Civil Suit No. 95 of 1930, Johore Appeal No. 3 of 1931, 1 Malayan Law Journal, page 48, (August 1932) the learned Legal Adviser submitted that Thorne, J. apparently expressed the view that in the case of land held,

as this was, by virtue of an approved application, the holder was a mere licensee under a license revocable at any time.

I have considered the passage where this expression of opinion occurs and it appears to me that it had relation only to the land, the subject matter of and to the particular facts in that Suit and was not intended as a general proposition, and further that the point was not one which it was necessary to decide in the Suit and the statement was only *obiter* and is not binding on me.

With the greatest repect to the learned Judge I am unable to agree if such was his opinion, that the holder of land under approved application is a mere licensee.

At any rate I am quite satisfied that in this Suit the parties were parties to a contract which could only be discharged by any of the means known to the law and I am quite clear that revocation was not one of those means.

In all the circumstances of this case I am of opinion that there must be judgment for the Plaintiff.

This being so, the question of damages has to be decided.

There is little evidence upon which any accurate estimate of the amount of the damages may be based.

It is quite certain, however, that at the time of the sale of the land there was in existence an estate comprising 110 acres of which all except perhaps some 25 acres was fully planted with cocoanut trees which were in full bearing and some 25 acres fully planted with areca nut trees also in full bearing.

The Plaintiff himself placed a value of $200.00 an acre as being a fair value of a cocoanut estate such as his in the year 1930, which would give a value of $22,000.00.

I have no doubt, however, that as the result of the want of ready cash the estate had been a bit neglected and would probably require a fair sum to put it into good condition and I think that $15,000.00 would be a reasonable value.

For his house, sundry goods shop and value of his trade with the Singapore Chop Huat Seng Hua Kee I consider that a round sum of $2,500.00 would not be unreasonable and I accordingly assess the amount of the damages to be paid by the Defendants to the Plaintiff at $17,500 on which sum the interest to be allowed as set out below is to be based.

There will be:—

(1) A Declaration that the Sale of the land, the subject matter of this Suit, by the Defendants was wrongful and that the Plaintiff is entitled to damages in consequence thereof.

(2) An Order that Defendants do pay to the Plaintiff as damages the sum of $17,500 with interest thereon at the rate of 8% per annum from the date of the sale to date of Judgment and at the rate of 8 per cent per annum on the sum of $17,500.00 and interest as aforesaid from the date of Judgment to date of realisation.

(3) An Order that Defendants do pay to the Plaintiff the costs of this Suit on the claim and Counterclaim to be taxed by the Officer of the Court except that there will be no order as to the costs incurred by reason of the amendment of the Plaintiff's Plaint.

Judgment accordingly.

From the above decision the defendants appealed. The appeal came on for hearing before Huggard, C.J., Thorne and Gerahty, JJ.

M. C. Hay, Legal Adviser, for the Appellants.

Roland Braddell (*Goho* with him) for the Respondent.

Cur. Ad. Vult.

THORNE, J. delivered the joint judgment of **HUGGARD, C.J.**, himself and **GERAHTY, J.** —The plaintiff-respondent applied to the Government of Johore for the grant to him of 20 acres of State land in the Mukim of Jeram Batu by written application which bears date the 12th February, 1917. The application is in the form of Schedule 1 to the Land Rules of 1910 except that paragraph 2 of the form has been altered and reads, " I have used the land for cocoanut and arecanut trees."

The plaintiff appears to have been in occupation of an area of State land prior to this date and to have cultivated a larger area than 20 acres. On the 9th April, 1918, he applied to the Government in writing for the grant to him of a further 80 acres of State land, of part at least of which he was then in occupation. This application is in the same form as the earlier one.

Upon one of these forms of application there appears a very rough sketch in pencil, and upon the other there is no sketch or plan.

The plaintiff continued in occupation of State land, and on the 25th July, 1922, the Government communicated to the plaintiff their approval of the alienation to him of 110 acres of State land in that locality on the terms and conditions set out in the Land Enactment of 1910 and the Rules thereunder, subject to the payment of a premium of $5 per acre and an annual rent of $3 per acre from the 1st January, 1922. By paragraph 2 this communication called upon the plaintiff to deposit with the Collector of Land Revenue the sum of $1,175, made up as set out in that paragraph. The letter concluded with the intimation "that

unless special written permission has been sought and obtained no occupation of the land referred to will be allowed prior to the issue of the grant." In fact the applications disclose that the plaintiff was already in occupation and had so been for many years.

The plaintiff paid to the Government the sum of $1,175 as required in terms of the letter of approval on the 14th of October, 1924, and thereafter paid the annual rent up to and including the year 1928, but failed to pay the annual rents which fell due on the first of January, 1929 and 1930.

On the 21st May, 1930, the Collector of Land Revenue issued a notice to the plaintiff demanding payment of the quit rent then in arrear, which was served on the plaintiff on the 25th May. The plaintiff failed to pay, and on the 30th July, 1930, the Collector of Land Revenue issued a warrant of attachment against moveable property to recover $661.50. On the 3rd August, 1930, a number of pigs and a shed were attached under this warrant. The sale of this property was fixed for the 27th September, 1930, but no bidders attended and the auction was abortive.

It would appear from the Land Office minute papers that the Government decided to treat this case as though a title had already been issued and they accordingly proceeded under Part VII of the Land Enactment to realise the land the subject of the approved application. Thereafter the usual notice of sale of land was issued and served on the plaintiff and published in the Government Gazette as Notification No. 866. The land was offered for sale by auction on the 18th July, 1931, but there were no bids, and the result of that abortive auction was noted in the Auction Sales Book. If Part VII of the Land Enactment applies in this case and the necessary steps preliminary to the auction sale had been taken the land would have reverted to and become vested in the Ruler of the State under the provisions of Section 90 of the Land Enactment.

The provisions of this Section however were disregarded and a further notice of sale of the land, the subject of the approved application, was issued and published. The land was again offered for sale by auction on the 24th October, 1931, when it was sold to the highest bidder for $925.

Subsequently the Collector of Land Revenue made up his account deducting from the gross proceeds of sale the amount due to the Government and certain expenses shewing a surplus of $268.50 which sum he remitted to the plaintiff.

On the 6th day of June, 1933, the plaintiff brought this action against the State of Johore and, as subsequently amended, the plaint claimed that the defendants had approved his application for an area of 110 acres of land which was alienated to him in the year 1922; that he had gone into occupation and cultivated the land and paid his quit rent up to and including the year 1928; that he failed to pay the quit rent for the years 1929 and 1930; and that the defendants wrongfully and/or in breach of the contract between the parties sold the land to one Lee Wee Nam. The plaintiff alleged that the contract between himself and the defendants was that in consideration of the payment by him of premium, etc. the defendants agreed to issue a grant for the 110 acres on the terms and conditions set out in the Land Enactment of 1910 and the Rules thereunder, and, subject to the payment of rent, impliedly agreed that he should have quiet and peaceful possession of the land, and that in case of his failure to pay the annual rent the defendants would be at liberty to sell the land provided the procedure laid down in Part VII of the Land Enactment and particularly the provisions of Sections 78 and 83 were followed; and that the defendants wrongfully sold the land in breach of the terms of the contract either express or implied. The plaintiff further alleged that the sale was wrongful in as much as before selling the land the defendants failed to exhaust their remedies under the Land Enactment by seizure and sale of personal property and he accordingly claimed a declaration that the sale was wrongful, and he claimed to recover damages and costs.

The defendants filed a defence and counterclaim which it is not necessary to consider in detail at this stage.

The learned trial judge held that Part VII of the Land Enactment applied to this land; that it was the duty of the Government to exhaust their remedies by the sale of all personal property to be found on the land before proceeding to a sale of the land itself; that there was in fact on the land at the material dates a considerable quantity of personal property probably sufficient in value to satisfy the claims of the defendants; and that the defendants had failed to comply strictly or properly with the provisions of Section 80 of the Land Enactment and were therefore not entitled to sell this land; and that therefore the plaintiff was entitled to recover damages which he assessed at $17,500 with interest and costs of the action, and he dismissed the defendants' counterclaim with costs.

From the judgment the defendants preferred this appeal.

The appellants contend that alienation of this area of land was never completed; that the relations between the parties rested in contract; that the respondent had no estate properly so called in the land and could not acquire any estate in the land until such time as a grant was actually issued and registered; that although the officers of the Government concerned in this transaction had in fact treated this matter as though Part VII of the Land Enactment applied the provisions of that Part had no application whatever to this land; that in the events which had happened the appellants were entitled to rescind the contract

between themselves and the respondent; and that in fact the appellants had rescinded the contract, and when on the 24th October, 1931, they sold an area of land formerly occupied by the respondent they were selling State land and not the land of the respondent.

For the respondent it was urged,

(a) That when in 1924 he paid the premium and other fees to the Government, or within a reasonable time, after that date, he became a grantee in equity, and therefore in law, of the land the subject matter of his application;

(b) That he must be treated in equity as though a grant for this area of land in the statutory form had been issued to him in 1924, or within a reasonable time thereafter;

(c) That being so, non-payment of rent was merely a breach of the covenant upon which the appellants were only entitled to proceed under section 5 or under Part VII of the Land Enactment, or to exercise their rights under the ordinary law;

(d) That as the learned trial judge has found as a fact that the appellants had not exhausted their remedies by seizure and sale of all personal property on the land at material dates their action in selling the respondent's land was both trespass and a breach of contract for which the plaintiff was entitled to recover damages; and

(e) That the damages had been properly assessed by the learned trial judge at a sum equal to the value of the land.

The respondent gave notice of cross-appeal raising the question as to the quantum of damages awarded and the rate of interest to be allowed thereon.

It will be convenient to consider this case in chronological sequence.

It is abundantly clear that prior to the year 1924 the respondent was in wrongful and illegal occupation of State land, but the receipt by the Government in that year of rent and premium in respect of this land would appear to result in their being estopped from alleging that the prior occupation of the respondent was illegal.

The respondent claims that an area of 110 acres was completely alienated to him in the year 1924 or within a reasonable time thereafter. Whether this case be regarded as falling within Part III or IV of the Land Enactment is immaterial on this point since Sections 30 and 53 are in identical terms. These Sections provide that alienation of State land may be by auction or otherwise as the Sultan in Council may from time to time generally or in particular cases directed.

It is argued for the respondent that the approval of an application as in this case followed by the payment of premium etc. effects a complete alienation of State land. This proposition appears to have been accepted by the learned trial judge, but does not find acceptance with the members of this Court. Alienation under the system which obtains in the State of Johore is not complete until the issue and registration of a grant, and although upon the approval of an application an area of land may cease to be State land as defined in section 2 of the Enactment, yet the State does not divest itself of its ownership of land unless and until a grant has actually been issued and registered.

The respondent further contends that even if alienation was not complete in the year 1924 yet from that date the State became a trustee of this area of land for the respondent who in equity must be regarded as the owner of the land and to be in the same position as though a grant had actually been issued. The question then to be considered is whether under this system of land laws equitable estates in land can be created. It is to be remembered that the title to land is brought into being upon the issue and registration of either a grant, or a lease, or by entry in the mukim register. In the case of grants and leases the duplicate of the original of the document of title becomes the commencement of the register. In the case of an entry in the mukim register the title is created by the first entry in the register. The register is thereafter the mirror of title. It is to be remembered also in this case that no grant had been issued and we have to consider therefore whether prior to the creation of a title under the Land Enactment an equitable estate such as is contended for by the respondent can be treated.

It is true that the courts of this state administered the principles of equity under the provisions of the Specific Relief Enactment. The principle for which the respondent contends is a rule of equity which has grown up under the system of conveyancing which obtains in England, and the question therefore is whether that principle is of apt application in a state in which the system of conveyancing and land laws differ materially from the English system.

This question has been considered in other jurisdictions in which the system of registration of title to land obtains. It was laid down in the case of *Crowley* v. *Bergthiel*, 1899 Appeal Cases at page 390, as follows:—

> "By the law of Natal a purchaser of land, though he may have paid the price, is not until regular legal transfer the owner of the land, but is only one who has a claim against the Vendor. To speak of him as

a true owner in the language of an English Court of Equity, though the expression may be used in speech for brevity's sake, is not correct."

Again, to quote the judgment of the Privy Council in *Howard* v. *Miller* on appeal from the Supreme Court of Canada, 1915 Appeal Cases, page 318, at page 326, where this passage occurs:—

"It is some time said that under a contract for the sale of an interest in land the Vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase money, but however useful such a statement may be as illustrating a general principle of equity it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract. The interest conferred by the agreement in question was an interest commensurate with the relief which equity would give by way of specific performance."

The case of *Howard* v. *Miller* (*supra*) was quoted with approval by the Privy Council in *Central Trust and Safe Deposit Co.* v. *Snider*, 1916 A.C. 266, in which case, at page 272, the following passage occurs:—

"It is often said that after a contract for the sale of land the Vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the object in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a Court of Equity be enforced specifically. If for some reason equity would not enforce specific performance, or if the right to specific performance has been lodged by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or convenantor either never was, or has ceased to be, a trustee in any sense at all."

It would appear that the right of the purchaser under the system of conveyancing in which registration of title obtains is somewhat analogous to that of the Roman *Fidei Commissum*, so that the purchaser who has paid the whole of his purchase price has no estate, properly so called, in the land agreed to be purchased, but has rights which rest in contract, and which may or may not, according to the circumstances of the particular case, entitle him to sue and to invoke the equitable principle of specific performance. To state the matter in another way, the purchaser has no rights *in rem* but has only a right *in personam* against the Vendor. It is unnecessary for the purpose of the present case to decide whether the plaintiff here is in the same position as a purchaser under a contract of purchase of land from a registered proprietor, but assuming for the sake of argument that the present plaintiff should be regarded as the purchaser of an area of land from the State it is the opinion of this Court that his rights are still merely contractual and that the relief to which he would be entitled is such relief, if any, as the Court administering equitable relief under the Specific Relief Enactment would accord to him.

It follows therefore that in the opinion of this Court the respondent never acquired a title to this land and his claim, so far as it is founded on tort, must fail.

This being so, it is immaterial whether or not the appellants, in their endeavours to recover the arrears of rent, complied strictly with the requirements of Part VII of the Land Enactment, since it is clear from an examination of the provisions of that Part that it applies only to land held under some form of title recognised by the Enactment and has no application to land which is merely the subject of an approved application.

It therefore remains only to consider what, if any, contractual rights the respondent may have under the letter of the 25th July, 1922.

The respondent's original applications did not specify the area of land for which he applied and the approval of the applications was of an area of 110 acres in the locality of Jeram Batu. The Collector of Land Revenue would probably have been wise before approving the application to have called for a more accurate description or definition of the area applied for, and it is probable that considerable difficulty would have been met with in an action for specific performance by reason of the uncertainty of the area of land affected by the contract. But by their defence in this suit the appellants have repeatedly referred to the land in question in such a manner as to place it beyond all doubt that they knew exactly what area of land was referred to, and in view of this admission of the defence the respondent would have had no difficulty upon that point.

From the year 1929 onwards the respondent was clearly in default in the payment of his rent. Under the Land Rules land occupied otherwise than under permanent title . . . . is liable to the payment of rent in the same manner as land alienated under the Enactment (See Land Rule 8).

Under Rule 14 all rents payable under the Enactment, or the Rules, fall due in advance on the 1st day of January. The contract between these parties would appear to be sufficiently wide in its terms to import the provisions of these Rules at least.

The first notice issued by the Collector of Land Revenue was in the form of Schedule U and required the respondent to pay the arrears of rent within 15 days from the date of service of that notice.

The notice of sale of the 29th November, 1930, was in the form of Schedule X and gave notice to the respondent that at the expiration of four months from that date the Collector proposed to sell the land by public auction to recover the arrears of rent due. The effect of these two notices would appear to be that if time was not of the essence of the contract under the contract as read with the Land Rules these notices made time of the essence.

The notice of intention to sell followed by the advertisement to sell by public auction, and the actual holding of the auction on the 18th July, 1931, was a communication of the intention on the part of the appellants to offer the land for sale by public auction and thus put it out of their power to grant this land to the respondent and was a complete repudiation of their contract to grant the land to him. It was therefore an unequivocal communication to the respondent of the rescission of the contract which had become voidable at the instance of the appellants by reason of the antecedent failure on the part of the respondent to perform this part of his contract.

Under Section 66 of the Indian Contract Act the rescission of a voidable contract may be communicated or revoked in the same manner and subject to the same rules as apply to the communication or revocation of a proposal. The previous course of dealings between the parties justified the appellants in communicating as they did.

If the respondent sued that the appellants on the contract claiming specific performance prior to the abortive auction of the 18th July, 1931, he could not have recovered because he could not have shewn by his plaint that he had already performed the terms of his contract on his part to be performed up to that date, and if he had sued after the 18th July, 1931, the further answer would have been that the contract had been rescinded and that therefore there was no contract of which specific performance could be decreed. The sale of which the respondent complains is that of the 24th October, 1931, and not the earlier and abortive sale of the 18th July, 1931.

On the 24th October, 1931, the contract between the parties had been rescinded and the plaintiff had no rights under the contract which he could enforce by specific performance against the appellants, and therefore his claim based on the contract must also fail.

Some suggestion was made that the payment by the Government of the sum of $268.50 to the respondent after the sale was an acknowledgement that the respondent was the owner of the land, and that the appellants could not now be heard to say that he was not the owner.

This payment was quite clearly a mistake, and was no more than a gratuitous payment.

The question was not raised by the respondent on his pleadings, but even if it had been it is difficult to understand how any question of estoppel by conduct can arise against the appellants in view of the fact that the payment thus made was long after the sale complained of and could not therefore have affected the respondent, or have caused him to do or refrain from doing any act before the sale the commission or omission of which in any manner affected his rights.

The appeal will be allowed, the judgment of the Court below reversed and judgment entered for the appellants against the respondent dismissing his claim with costs. Any costs already paid under the judgment of the Court below must be refunded.

There is no appeal against the dismissal by the learned trial judge of the appellants' counterclaim. The cross appeal will stand dismissed.

There remains one matter which was not argued, and it is this. The respondent paid to the appellants a sum of $295 being survey fees and cost of boundary stones on 110 acres. The appellants were not shewn to have surveyed this land or to have affixed boundary marks at the date of the rescission of the contract. The appellants have in fact paid to the respondent a sum of $268.50 being the difference between the price which the land fetched at auction and the sum due to the Government for rent and costs. The difference between these two sums—$26.50—should be paid by the appellants to the respondent. The appellants should have their costs both of the appeal and cross appeal against the respondent, and will be entitled to set off a sum of $26.50 against such costs.

Appeal allowed.

Solicitor for the Appellants—*M. C. Hay*, Legal Adviser.

Solicitor for the Respondent—*S. C. Goho*.